United States Court of Appeals

for the Second Circuit

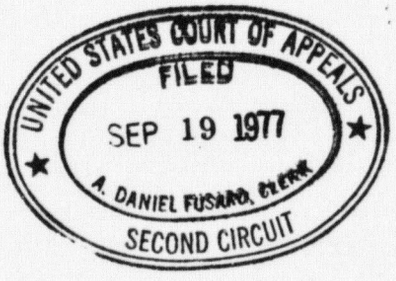
BRIEF FOR APPELLANT

76-2155 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MACIO ENNIS, Petitioner-Appellant, -against- E. LeVRE, Superintendent, Clinton Correctional Facility, Respondent-Appellee,	Docket No. 76-2155

BRIEF FOR APPELLANT ON REHEARING



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MACIO ENNIS
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

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This brief is prepared and filed with leave of the Court* after the filing by appellant of a petition for rehearing with suggestion for rehearing en banc and examination of the transcript of the state court Wade hearing, given for the first time to any counsel for appellant.

The issue to be discussed is whether appellant was prejudiced by the failure of the State to supply him with a copy of the transcript of the Wade hearing for purposes of perfecting

*The permission was granted in a letter to appellant's counsel dated September 7 , 1977. Counsel sought and was granted time to file the brief until September 20, 1977.

his appeal to the Appellate Division from the judgment of conviction* and by the failure of his counsel, assigned for the appeal, to make a further request for those minutes after he learned from appellant that they were not part of the record.**

Examination of the Wade hearing transcript establishes that under the New York substantive law dealing with identification testimony and under the powers of the Appellate Division to review findings of law and of fact, including credibility, substantial issues exist, and these should have been raised on the appeal.

I. A View of New York Law

Under New York law, the burden of showing the suggestiveness of a pre-trial identification procedure is on the defendant. If that showing is made, an in-court identification is admissible only after the prosecutor meets his burden of establishing by clear and convincing evidence that the in-court identifications were made by the independent observations of the witness at the time of the crime. People v. Rahming, 26 N.Y. 2d 411, 416-417 (1970); People v. Burwell, 26 N.Y.2d 331 (1970);

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*The responsibility of the court reporter under New York law to transcribe the entire transcript (in this case, the Wade hearing occurred in the midst of trial) when the Appellate Division permits appeal in forma pauperis (as it did here) is discussed in I of the Petition for Rehearing.

**The issuance of the competence of counsel's conduct is discussed in II of the Petition for Rehearing.

People v. Ballott, 20 N.Y.2d 600 (1967); People v. Brown, 20 N.Y.2d 238 (1967).

Testimony of a pre-trial identification made from a photograph is never admissible as part of the People's direct case (People v. Baker, 23 N.Y.2d 307, 323 (1968); People v. Cioffi, 1 N.Y.2d 70, 73 (1956); People v. Fluker, N.Y.L.J. March 26, 1976, p.8, cols.4-5 (2d Dept. 1976); People v. Giamario, 20 A.D.2d 815 (2d Dept. 1964), affirmed, 15 N.Y.2d 939 (1965)).

Evidence about a valid corporeal pre-trial identification may be introduced by the People only through the testimony of the person who made the identification. C.P.L. §§60.25, 60.30 (McKinney's 1965); People v. Trowbridge, 305 N.Y.2d 471 (1953).

On review, both the Appellate Division and the Court of Appeals have power to examine the findings of the trial judge to determine whether the lower court findings as to suggestiveness were correct (see, e.g., People v. Ballott, supra; People v. Rahming, supra; People v. Simon, 49 A.D.2d 517 (1st Dept. 1975); People v. Ames, 49 A.D.2d 514 (1st Dept. 1975); People v. Lebron, 46 A.D.2d 776, 777-778 (2d Dept. 1974); People v. Velez, 43 A.D.2d 745 (3d Dept. 1973)) and to determine whether the People have met the burden of establishing by clear and convincing proof an independent source for the identification. See, e.g., People v. Gonzalez, 27 N.Y.2d 53 (1970); People v. Simon, supra, 49 A.D.2d at 519; People v. Lebron, supra, 46 A.D.2d at 778; People v. Toro, 44 A.D.2d 848 (2d Dept. 1974); see also People v. Amarosa, 55 A.D.2d 621 (2d

Dept. 1976) (review of whether there was probable cause to arrest); People v. Nieves, 48 A.D.2d 611 (1st Dept. 1975) (review of whether there was probable cause to arrest); People v. Massiah, 47 A.D.2d 931 (2d Cir. 1975) (review of whether People had proved consent to enter an apartment).

Beyond this review of the legal issues of whether the pre-trial identification was suggestive or the in-court identification valid, the Appellate Division has the unique and critical power to review the credibility of the witnesses. People v. Nieves, supra; People v. Massiah, supra; C.L.P. § 470.15 (McKinney's 1965). It can thus determine whether the witness was being truthful in appraising his ability to make an in-court identification based on observations made at the time of the crime.

One further power based in the Appellate Division is its power to find that the improper admission of testimony relating to pre-trial identification is error, even without objection, in the interest of justice. People v. Peterson, 25 A.D. 2d 437, 438 (2d Dept. 1966); People v. Giamario, supra, 20 A.D.2d at 816; cf. People v. Trowbridge, supra, 305 N.Y. 471; People v. McGill, 47 A.D.2d 961 (2d Dept. 1975); People v. Hoban, 28 A.D.2d 562 (2d Dept. 1967); People v. Jenkins, 24 A.D.2d 716 (2d Dept. 1965); People v. Thompson, 16 A.D.2d 705 (2d Dept. 1962); People v. Altintop, 13 A.D.2d 508 (2d Dept. 1961).

In the event the pre-trial procedure is suggestive and

there is no independent basis for the in-court identification, the Appellate Division can then examine the issue of harmless error, which was, of course, not considered by the trial court. Only if the Appellate Division concludes that there was sufficient evidence of guilt apart from the tainted in-court identification may it, notwithstanding the defect, affirm the conviction. See, e.g., People v. Gonzalez, supra;* People v. Toro, supra; People v. Ames, supra.

II. Contrast Between New York and Federal Law

The substantive law of New York and of the federal courts differ totally in the admissibility of both pre-trial and in-court identifications in the event there is a suggestive pre-trial identification.

As noted earlier, once New York finds that the pre-trial identification is suggestive, it is inadmissible at trial; then the independent source test is invoked to determine the admissibility of the in-court identification. This test is derived from United States v. Wade, 388 U.S. 218 (1967), although Wade deals with the right to counsel at pre-trial procedures, and not with the suggestiveness of them. On the other hand, in the federal courts, even if a pre-trial identification procedure is suggestive, its admissibility, as well as that of subsequent in-

*Gonzalez is significant, for it examines two issues: independent source for the identification and independent evidence of guilt. New York courts make this distinction. See Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Bklyn. L.Rev. 261, 314 (1971).

court identifications, is permitted if there is "reliability," as determined by the totality of the circumstances. Such an evaluation includes an appraisal of the identification procedures, the external factors, and other evidence of guilt presented at trial. The ultimate question is whether the person identified is the person who committed the crime. Manson v. Brathwaite, 45 U.S.L.W. 4681 (S.Ct. 1977). As the Court said in Brathwaite:

> It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability.
>
> Id., 45 U.S.L.W. at 4654.

The factors to be considered in deciding the reliability of the suggestive identification are opportunity to view, degree of attention, accuracy of the description, the witness' level of certainty in making the pre-trial identification, and the time between the crime and the pre-trial identification. Id., 45 U.S.L.W. at 4685-4686. This test is simply not comparable to the New York test.

Further, even under the Second Circuit's decisions preceding Brathwaite, beginning with United Statates ex rel. Phipps v. Follette, 428 F.2d 912 (1970), the standard is different, Under Phipps, the validity of the in-court identification was determined by a range of factors far broader than the mere opportunity to observe at the time of the crime.

A second critical distincton between New York and Second Circuit law is the burden of proof. Under federal constitutional law, the burden of proving a substantial likelihood of

irreparable misidentification is upon the defense (see Manson v. Brathwaite, supra). Under New York law, the burden is on the State to prove an independent source of the identification by clear and convincing evidence.

Of course, a basic difference is that under New York law, any photographic identification, even a valid one, is inadmissible as part of the People's direct case under any circumstance. Admission of an unfair photographic identification makes the error more egregious under New York law.

The review powers of the Second Circuit are far more limited than those of the Appellate Division. The Second Circuit cannot review credibility of witnesses, and is far more circumspect in reviewing unobjected to evidentiary errors, such as the improper admission of identification testimony (see Point I, supra, at 4) than is the Appellate Division.

III. The Facts Here

A. The Victim's Testimony at the Wade Hearing About the Crime

Bertha Reed testified that on January 30, 1973, at 8:30 a.m., she was in the basement laundry room of the apartment building in which she lived. She was sitting with her back to the door, reading her newspaper, when someone put an arm around her neck. Looking to her left, Reed saw the brown leather sleeve of a coat; looking to her right, she saw an open razor in her assailant's hand. With his arm still around Reed, the assailant and Reed proceeded to an adjacent incinerator room. The door was closed and Reed extinguished the light. At the assailant's direction, Reed disrobed. Just then, the superintendent opened

the door of the incinerator room, and the assailant ran out (H. 49-54*).

Ms. Reed testified that she did not see the man while she was in the laundry room. At first she testified that she did see him in the incinerator room (H.68, 69); however, when faced with her prior testimony given at the preliminary hearing, she acknowledged that she did not see the man in the incinerator room either (H.77-78). She admitted that the only time she saw the man was as he ran from the incinerator room when the superintendent opened the door (H.78). According to Reed, as the man ran from the room, he looked back and she saw his face. The court refused to permit counsel to cross-examine Reed on whether she saw the man full face or profile (H.81), the length of her observation (H.82), and her mental state at the time (H. 83). Reed described the man as brown-skinned, 28-30 years old, and wearing a brown leather coat (H.19).

B. The Victim's Testimony at the Wade Hearing About Events Preceding the Crime

Reed testified that before she was attacked she rode in the elevator of her building with a man whose full face she saw (H. 82). According to Reed, that man was appellant.

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*Numerals preceded by "H" in parentheses refer to pages of the transcript of the Wade hearing; when preceded by "T", such numerals refer to pages of the transcript of the trial.

C. The Photographic Spread

On February 24, 1973 (H.7), while Reed was in the hospital for an illness unrelated to the crime (H.24, 84), Detective Heinsohn showed her a stack of eight photographs (H.11) and asked her whether the man who attacked her was among them (H.8, 45, 85). Ms. Reed selected the photograph of appellant.

Heinsohn had obtained appellant's photograph from a police precinct after he learned of appellant's arrest on another crime (H.38-39).

At the hearing, counsel noted that the card* indicated that most of the photographs were of people under 28 years of age (H.23); that only two photographs were not on cards (H.35); that only two depicted men with Afro hairdos (H.37); that only one -- appellant's -- had a name directly on the photo, accompanied by the words "non-addict" (H.38); and that appellant's photograph contained a profile (H.87).

Ms. Reed testified as to how she selected the photograph of appellant:

> Q. When you saw the photograph, is there anything -- What made you, if you know, pick out that photograph as the defendant?
>
> A. Well, first of all, I remembered his features as I had seen them in the elevator.
>
> THE COURT: You remembered his what, madam?
>
> THE WITNESS: His facial features. And

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*It is unclear what this "card" is.

also I remembered that he was brown skinned, that he had an afro hair cut.

Q. All right. Now, you remembered his face in the elevator? His features in the elevator?

A. Yes.

Q. You remembered he was brown skinned and you remembered he had an afro hair cut; is that correct?

A. Right.

(H.93).

Ms. Reed repeated this evidence at pages 98 and 99.

D. The Pre-Trial Courtroom Identification

On March 1, 1973 (H.31), at the suggestion of Detective Heinsohn, Ms. Reed went to Part 101 on the eighth floor of the criminal courthouse in Brooklyn (H.29). Heinsohn had told Reed that the man who had attacked her might be there (H.58, 61, 62).* As she opened the door of the courtroom, appellant looked at Reed and she saw him. She recognized him as the man she had seen in the elevator (H.65, 66, 71-72) and that he was the man who had raped her (H.67).

E. The Judge's Findings

As an introduction to his oral decision, the court made the following statement:

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*Heinsohn knew that appellant would be there on an adjournment date in another case.

> It is actually brought on as a motion to suppress, while the burden in the first instance of showing the legality of the procedure rests with the people, the ultimate burden of persuasion rests with the defendant.
>
> (H.107).

The judge then credited the testimony given and proceeded to detail the facts of the crime, referring interchangeably to "the defendant" and "the individual" (H.108-110).

The court then found that the identification procedures were not suggestive and that "the people have established by clear and convincing proof that the in-court identification was not the result of the pre-trial procedures" (H,115).

F. Trial Testimony

At trial, Ms. Reed testified:

> As the super opened the door, the man ran out and he passed, he went past me and the super, he looked back at me.... I got a glimpse of his face.
>
> (T.75).

She identified appellant as the man (T.77). Then Reed related the events at Brooklyn Criminal Court (T.82) and testified to the identification of a photograph of appellant (T.84).

Other evidence at trial was that the superintendent did not see the man's face when he ran away and could not identify him (T.34).

Although the superintendent could not identify the man and did not follow him out of the building, but went instead another

way, he testified that he saw "this man across the street and get in a [brown (T.57)] car" (T.35).

The superintendent jotted down the license number and gave it to Detective Heinsohn. The license number was Y6843 (T.157). This number had been surrendered the previous year (T.159), and Heinsohn modified the number by adding an initial "F" (T.160), as a result of which he learned that the car was a gold car owned by Rose Brown (T.161) and that appellant had used it on January 30, 1973 (T.200). Ms. Brown testified that she did not know everybody who drove the car (T.201).

IV. Issues for the Appeal from the State Judgment

Several important and substantial issues are presented by the Wade hearing which were not before the Appellate Division. Initially, it must be noted that the position that appellate counsel was incompetent is reinforced by his failure to raise on the appeal the clear error resulting from the admission as part of the People's direct case of the testimony about the photographic identification (see supra at 3). It was previously indicated that appellate counsel was aware that there were pre-trial identification procedures from the trial record.

1. The Appellate Division could have reviewed the correctness of the trial court's finding that the photographic spread was not suggestive. The hearing revealed that, of the eight photographs used, most were of people under 28 years of age, only two depicted people with Afro's, two were not on

cards, appellant's showed a profile as well as a full face, and appellant's was the only one with the name and the words "non-addict" written on the photograph itself. Further, since Heinsohn had obtained appellant's photograph from another precinct after an unrelated arrest and it contained a profile, it appears that the photograph may have been a mug shot.

On this record, the Appellate Division can conclude that the photographic spread was suggestive.

2. The Appellate Division could also have examined the opportunity for independent observation at the time of the crime and found that the State had not produced clear and convincing evidence. Reed testified that she saw the side of the man's face for only a glimpse after he ran from the incinerator room. Her glimpse occurred when the lights suddenly went on after the witness had been in the dark. More substantial independent observations than this have been held inadequate. People v. Simon, supra (viewing for 30 seconds under stress of robbery); People v. Lebron, supra.

3. The Appellate Division could have reviewed Reed's reliability and credibility. Reed's testimony at the preliminary hearing was that she had seen her assailant only as he fled. At the Wade hearing, she first testified that she saw the man in the incinerator room before the lights went out and then as he fled. When faced with this inconsistency, Reed reverted to her earlier testimony. This inconsistency in her recollection, when coupled with her repeated asser-

tions that the photograph she selected was of the man she had seen in the elevator and with the testimony that she had only a profile glimpse of the man as he ran away could have led the Appellate Division to reject Reed's assertion that she identified appellant as the man. The credibility of her testimony is further cast in doubt by the fact that the "glimpse" of the man was assertedly made just as the lights went on after a period in darkness, when visibility is difficult, and by Reed's and the superintendent's disagreement concerning the state of Reed's undress. Compare 36 with

4. The Appellate Division could have concluded that the trial judge improperly limited the examination of Heinsohn by defense counsel about the photographs and of Reed about her state of mind at the time of the crime.

5. The Appellate Division could have concluded that the identification of appellant in the courtroom at the Criminal Court Building in Brooklyn was the product of the suggestive photographic spread and concluded that it was error to admit into evidence testimony about the courtroom identification. The Appellate Division might have concluded that if there had been no bolstering of Reed's in-court identification by evidence about both pre-trial identifications, the jury might have rejected the in-court identification.

6. Since there are substantial questions of whether the procedures employed were valid and the trial fair, the Appellate Division must also be given the opportunity to evaluate

harmless error. Surely the Second Circuit cannot rule on that issue when no New York court has done so. Further, the issue of whether the improper admission of any identification evidence can be deemed harmless in light of the meager evidence in this case is substantial. The superintendent could not identify appellant as Reed's assailant. Further, the superintendent's testimony as to the license number and color of the car he saw used was incorrect. In addition, the testimony was that the owner of the car was unaware of who used it.

7. At the beginning of his oral opinion, the trial judge stated the entirely incorrect standard for burden of proof. While at the conclusion of the opinion the judge corrected himself, it was a question for the Appellate Division to decide whether he in fact applied the proper standard.

8. In making his findings, the trial judge gave a full, but irrelevant, statement relating to the facts of the crime, in which he continuously interchanged the words "defendant" and "individual." It was up to the Appellate Division to determine whether the judge believed appellant guilty and was thus biased in his appraisal of the evidence.

* * *

It is apparent that the failure of the Appellate Division to consider the full record on this appeal deprived appellant of the opportunity to have that court consider substantial

legal and factual questions going to the validity of identification, which played such a significant role in this case. The failure of the court reporter to transcribe the minutes of the Wade hearing, which occurred during trial, and the failure of the Appellate Division to make a further direction to the court reporter, was the requisite state action. The failure of assigned appellate counsel to act demonstrates extraordinary lack of responsibility and incompetence.

CONCLUSION

The order of the panel of this Court should be vacated, the order of the district court reversed, and appellant released from all custody of the State of New York unless he is granted a new appeal to the Appellate Division within a reasonable time.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MACIO ENNIS
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

Sept 20, 1977

I certify that a copy of this brief ~~and appendix~~ on rehearing has been mailed to the Attorney General of the State of New York.